Supreme Court, U.S.
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No. 92-697

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MARTIN G. WANGURI

Petitioner,

v.

PORT OF HOUSTON AUTHORITY,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Rights Act of 1991 should apply retroactively to a case in which the underlying facts occurred approximately five (5) years prior to the effective date of the Act and which was tried in District Court prior to the effective date of the Act.

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STATEMENT OF THE CASE

Petitioner Martin G. Wanguri ("Petitioner") filed suit in the United States District Court for the Southern District of Texas, Houston Division on February 8, 1988 (R.5), alleging that Respondent Port of Houston Authority ("Respondent"), discharged him because of his race (Black) and national origin (East African) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") (R.5).

On June 19, 1989, after more than one year had passed without service of the Complaint on the Port, the District Court entered an Order of Dismissal pursuant to Rule 4(j) of the Federal Rules of Civil Procedure (R.6). On June 22, 1990, Petitioner filed a Motion to Reinstate his Complaint (R.7). By Order dated October 15, 1990, the District Court granted Petitioner's Motion to Reinstate (R.12).

Respondent had no notice of any of the foregoing until service of the Plaintiff's Original Complaint on October 19,

1990 (R.24-25). The District Court allowed Respondent to file a response to Plaintiff's Motion to Reinstate (R.20). On January 2, 1991, Respondent filed its Opposition to Petitioner's Motion to Reinstate, or alternatively, Motion to Dismiss (R.25). The District Court denied Respondent's Motion to Dismiss on October 25, 1991 (R.134).

The case was tried before the Honorable Frances H. Stacey, United States Magistrate Judge, on October 28 and 29, 1991 (R.146-147). Both parties consented to final judgment by Magistrate Judge Stacey pursuant to 28 U.S.C. §636(c) (R.136). On November 29, 1991, the District Court entered Findings of Fact and Conclusions of Law (R.175). The District Court held that Petitioner failed to prove that Respondent's actions regarding Petitioner were based on his race or national origin (R.171). The District Court held that Petitioner failed to establish a *prima facie* case of disparate treatment (R.166). The District Court further held that, regardless of Petitioner's failure to meet his burden of proof, Respondent produced a legitimate nondiscriminatory reason

for discharging Petitioner that was not pretextual (R.167, 171). In addition, the District Court found that Petitioner did not plead a "disparate impact" theory of recovery, but nonetheless held that Petitioner failed to show any significant statistical disparity to establish a *prima facie* case of disparate impact discrimination (R.169). The District Court entered judgment in favor of Respondent (R.176-177).

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court in an unpublished, *per curiam* decision.

REASONS FOR DENYING THE WRIT

There is no reason to consider whether the Civil Rights Act of 1991 ("the Act") should apply to this case, because retroactive application of the Act would have no effect on its outcome.[1/] Prior to trial, Petitioner did not plead

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[1/] Indeed, this case should have been dismissed prior to trial pursuant to Rule 4(j) of the Federal Rules of Civil Procedure. The Complaint was served on Respondent more than 120 days after filing, and Petitioner never established good cause for his failure to comply with Rule 4(j). Respondent presented this argument to the Court of Appeals, which was not addressed in the one-page decision affirming the District Court's

or otherwise assert that any policy of Respondent had a discriminatorily disparate impact on a protected class of employees. Rather, Petitioner only alleged intentional discriminatory treatment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* ("Title VII"), the analysis of which remains unchanged under the Civil Rights Act of 1991. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Title VII, as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), specifically outlines the elements necessary to establish "disparate impact" discrimination. 42 U.S.C. §2000e-2(k)(1)(A)(i). A party may establish a cause of action based on disparate impact only if the party demonstrates the existence of a particular employment practice that causes a disparate adverse impact on the basis of a protected class of employees, which the employer cannot demonstrate is job

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decision.

related and consistent with business necessity.[2/] During trial, as the District Court correctly found, Petitioner presented no competent evidence of a policy that disparately impacted a protected class of employees. Not only did Petitioner fail to identify a policy that allegedly was discriminatory, he failed to produce any statistical analysis of any disparate impact on any protected group of employees. Thus, any change in the burden of proof under the Civil Rights Act of 1991 would have no effect because Petitioner presented no initial *prima facie* case of disparate impact.

The underlying facts in this case occurred approximately five (5) years prior to November 21, 1991, the effective date of the Civil Rights Act of 1991. Trial in this case occurred in October 1991, again prior to the effective date of the Civil Rights Act of 1991. Petitioner, however, asserts that the Civil Rights Act of 1991 should apply to this

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[2/] That section of Title VII also provides that the complaining party may demonstrate the existence of an alternative employment practice that has less disparate impact than the challenged one, but the employer refuses to adopt the alternative practice. 42 U.S.C. §2000e-2(k)(1)(A)(ii). Petitioner made no such showing in this case, and therefore that provision is irrelevant here.

case, and cites this Court's decision in *Bradley v. Richmond School Board,* 416 U.S. 696 (1974) in support of this assertion. The *Bradley* opinion dealt with retroactive application of an attorney's fee provision of the Education Amendments Act of 1972, and does appear to create a presumption of statutory retroactivity. That apparent presumption, however, is questionable in light of the more recent decision in *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204 (1988), in which the Court articulated a presumption against retroactivity. The "apparent tension" between these two cases has been recognized, but not resolved. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827 (1990).

Although the *Bradley* decision permitted retroactive application of the statute involved, the Court also stated that the decision did not "hold that courts must always apply new laws to pending cases in the absence of clear legislative direction to the contrary." *Bradley, Supra,* 416 U.S. at 716. The *Bradley* decision, therefore, did not hand down a blanket

rule of retroactivity. Rather, the legislative history of the statute involved in *Bradley* contained "implicit support" for retroactive application. In contrast, no such support exists in the Civil Rights Act of 1991. The Act's legislative history presents little or no assistance in resolving this issue.

All but one circuit courts of appeals that have addressed this issue have held that the Civil Rights Act of 1991 does not apply retroactively. *See Baynes v. AT&T Technologies Inc.*, __F.2d __, U.S. App. LEXIS 26892 (11th Cir. 1992); *Gersman v. Group Health Association, Inc.*, 975 F.2d 866, 1992 U.S. App. LEXIS 21615 (D.C.Cir. 1992); *Landgraf v. USI Film Products, et al.*, 968 F.2d 427, 1992 U.S. App. LEXIS 17414 (5th Cir. 1992); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Mozee v. American Marine Service Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, No. 92-248 (Oct. 5, 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *but see*

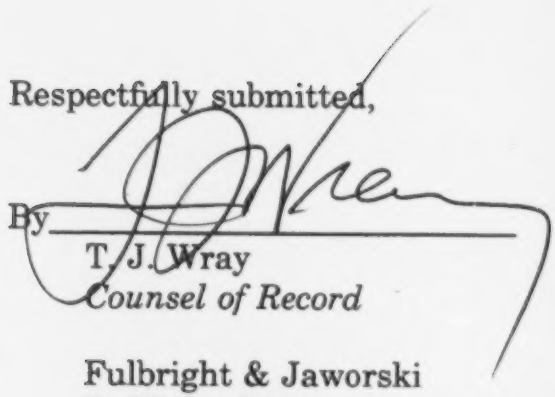
Davis v. City and County of San Francisco, __ F.2d __, 1992 U.S. App. LEXIS 24836 (9th Cir. 1992).

As noted, this Court has already denied a Petition for Writ of Certiorari on this issue in *Mozee v. American Marine Service Co., supra*. Respondent respectfully submits that the reasoning and results of the decisions by the vast majority of circuit courts of appeals are correct and that the Act should not be applied retroactively to a case that was tried prior to the Act's effective date.

CONCLUSION

Petitioner has demonstrated no compelling reason to review this case. Even if the Civil Rights Act of 1991 were applied retroactively to this case, the outcome would remain unchanged. As a result, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,



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